



4332-90-P

## DEPARTMENT OF THE INTERIOR

Office of the Secretary

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National Environmental Policy Act Implementing Procedures for the Bureau of Reclamation (516 DM 14)

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Notice of final National Environmental Policy Act Implementing Procedures.

**SUMMARY:** This notice announces the addition of a new categorical exclusion under the National Environmental Policy Act of 1969 for the Bureau of Reclamation in the Department of the Interior's Departmental Manual (DM) at 516 DM 14. The new categorical exclusion is for the transfer of title of certain projects and facilities from the Bureau of Reclamation to a qualifying non-Federal project entity. The new categorical exclusion allows for more efficient review of appropriate title transfer actions.

**DATES:** The categorical exclusion is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** The new categorical exclusion can be found at the web address

<https://www.doi.gov/elips/browse>, at Series 31, Part 516, Chapter 14.

**FOR FURTHER INFORMATION CONTACT:** Ms. Catherine Cunningham, Environmental Compliance Division, Bureau of Reclamation, (303) 445-2875; or via email at [ccunningham@usbr.gov](mailto:ccunningham@usbr.gov).

### SUPPLEMENTARY INFORMATION:

#### Background.

The Bureau of Reclamation (Reclamation) was established in 1902. Its original mission was one of civil works construction to develop the water resources of the arid Western United States to promote the settlement and economic development of that region. Results are well known in the hundreds of projects that were developed to store and deliver water. That substantial infrastructure contributed to making Reclamation the largest wholesale supplier of water and the second largest producer of hydropower in the United States.

### **Title Transfer.**

Title transfer is a voluntary conveyance of ownership (title) for water projects, portions of projects, or project facilities such as dams, canals, laterals, and other water-related infrastructure and facilities to beneficiaries of those facilities. Title transfer divests Reclamation of responsibility for the operation, maintenance, management, regulation of, and liability for the project, lands, and facilities to be transferred. It provides the non-Federal entity with greater autonomy and flexibility to manage the facilities to meet its needs, in compliance with Federal, state, and local laws and in conformance with contractual obligations. Title-transferred assets would no longer be Federal assets.

Under the Reclamation Extension Act of 1914, the responsibility for operations, maintenance, and replacement of facilities may be, and often is, contractually transferred to the water users. Title or ownership of facilities and projects, however, must remain with the United States until Congress specifically authorizes their transfer. Since 1995, Reclamation has been working closely with qualifying entities of specific projects and has conveyed over 30 projects and/or project-related facilities, including dams,

reservoirs, canals, laterals, buildings, project lands, and easements. Congressional authorizations for title transfer historically have occurred on a project-by-project basis. While Congress may authorize future title transfers by this same approach, recent legislation was passed to facilitate transfer of title for Reclamation project facilities. On March 12, 2019, the President signed into law the John D. Dingell, Jr. Conservation, Management, and Recreation Act, Public Law 116-9. Title VIII, Subtitle A of Public Law 116-9, *Reclamation Title Transfer* (Title VIII), authorizes Reclamation to transfer title of certain project facilities without additional Congressional action if they meet eligibility criteria, under procedures established by Reclamation.

Transfer of title is a Federal action under the National Environmental Policy Act (NEPA). NEPA requires that when a major Federal action would have significant impacts on the quality of the human environment, a statement be prepared to describe the impacts and effects on the human environment associated with the Federal action. When a Federal agency determines that a certain category of actions will not normally have an individually or cumulatively significant effect on the human environment and for which neither an environmental assessment (EA) nor an environmental impact statement (EIS) is required, that category of actions may be excluded from further NEPA review (40 CFR 1508.4). When appropriately established and applied, categorical exclusions (CEs) serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive EAs or EISs (Council on Environmental Quality (CEQ) 2010).

#### **Comments on the Proposal.**

Reclamation solicited comments from the public on establishing a new CE through a

30-day public comment period, announced in the Federal Register on October 17, 2018 (83 FR 52503). All comments received, to date, have been considered.

Reclamation received 16 letters from state governments, water and irrigation districts, water user organizations, a national environmental professionals association and a consortium of conservation interests. Individual comments included several that restated the objectives, limitations, and rationale for the CE, several that expressed general or detailed support or opposition for the CE, and several that expressed general or detailed support or opposition to transferring title.

Reclamation appreciates the interest and participation of all respondents. Reclamation has noted the comments, which provided general support and general opposition. For comments providing additional detail, questions, and suggestions, Reclamation, where appropriate, grouped the common comments and responds to the comments as follows:

*Comment 1—Adequacy of analysis of title transfers:* Commenters were concerned that a CE would preclude NEPA analysis or would not provide enough or sufficiently rigorous analysis for title transfer actions, including indirect effects, reasonable alternatives to be evaluated, and/or cumulative effects.

*Response 1—*CEs are not exemptions or waivers from NEPA. Rather, they are a type of NEPA review intended to accomplish the purposes of NEPA, efficiently and effectively. A CE is a tool to complete the NEPA environmental review process for proposals that normally would *not* require more resource-intensive EAs or EISs. Reclamation intends to meet requirements under NEPA and other laws and regulations, ensuring the appropriate level of analysis and public involvement, consistent with

regulations and policies. Any proposals not meeting the CE Qualification Factors (see CE Qualification Factors section in this notice) or triggering the Department of the Interior (Department) extraordinary circumstances, listed at 43 CFR 46.215, would need additional review.

*Comment 2—Adequacy of public and agency involvement:* Commenters were concerned that a CE would reduce the ability of the public and agencies to receive notification of the CE and provide public input. One commenter requested notification for any CE Reclamation considers across the Missouri River basin.

*Response 2—*The CEQ and the Department's NEPA implementing regulations do not require public notice of an agency's use of a CE. The eligibility criterion for transferring title, as described in CE Qualification Factor #8 does, however, establish Reclamation's commitment that affected state, local, and tribal governments, appropriate Federal agencies, and the public be notified, regarding proposed title transfers, and invited to participate in an open manner.

*Comment 3—Title transfers should be subject to Congressional approval to protect the public interest:* The commenter expressed concern that divestiture of any of Reclamation's projects or facilities without public or Congressional approval should be subject to specific limitations in order to protect the public interest.

*Response 3—*Reclamation is authorized to transfer title only as a result of Congressional action, including Public Law 116-9, Title VIII.

*Comment 4—Eligibility factors for a proposed title transfer to qualify for use of the CE:* The commenter recommends Reclamation's Framework for the Transfer of Title (September 2004) and Reclamation's policy clearly exclude the following types of

projects and facilities, in part or in whole, from use of the CE:

- large multi-purpose projects
- hydropower projects
- projects that lack consensus among project beneficiaries
- projects with a history of litigation or legal concerns
- inter-basin transfer projects or components of an inter-basin transfer project

*Response 4*—CEQ guidance advises that agencies develop CEs by setting limits on potential project actions to ensure they will not result in significant environmental impacts. Reclamation's new CE is intended to appropriately define and limit use to only those title transfer actions that meet CE Qualification Factors, do not involve extraordinary circumstances, and will not result in individually or cumulatively significant environmental impacts. Reclamation considered other factors for its CE, including some indicated by the commenter. Reclamation has determined, however, that the exclusions suggested by this comment are substantially satisfied in other CE Qualification Factors and analysis of extraordinary circumstances. For example, the transferee would be required to ensure there are no competing demands for the use of transferred facilities.

*Comment 5—Scope of proposed title transfers:* The commenter suggests that Reclamation should not divest a portion of a project that would not have qualified for a CE if considered in whole. The commenter expressed a particular concern with piecemeal divestitures involving the Garrison Diversion Unit.

*Response 5*—The terms "piecemealing" or "improper segmentation" are sometimes used to describe actions that are divided into smaller parts with less significant individual

effects, in order to avoid preparing an EIS. Section 1508.25 of CEQ's NEPA implementing regulations requires that "connected actions" and "cumulative actions" be analyzed in the same impact statement. Reclamation will consider extraordinary circumstances to ensure actions under any CE are not part of a larger action.

Reclamation would not be prohibited from transferring title to a portion of a larger project where Congress authorizes it. In such cases, Reclamation would define the scope of actions to ensure the appropriate analysis and documentation. For projects that would facilitate future actions or are an initial action in a known series of actions, an EA or EIS may be required.

*Comment 6—Extraordinary circumstances:* The commenter suggests that Reclamation should not categorically exclude from NEPA analysis any projects for which extraordinary circumstances exist.

*Response 6—*Reclamation confirms that it would not use a CE for projects for which extraordinary circumstances exist. Reclamation prepares a CE Checklist to use any CE in 516 DM 14.5. The checklist provides a methodical approach to defining a proposed action according to its list of CEs and ensuring that the proposed action is analyzed against each extraordinary circumstance.

*Comment 7—Suggested language to clarify CE Qualification Factors:* Three commenters suggested amending the CE Qualification Factors to recognize coordination of operations agreements with the following edits (added language is indicated in italics below):

#3. The potential transferee must ensure that there are no competing demands for use of the transferred facilities, *with the exception of those demands accommodated by*

existing contractual arrangements.

#4. The potential transferee must ensure that the facilities proposed for transfer are not hydrologically integrated with other facilities thereby impacting other contractors, stakeholders or activities, with the exception of those impacts accommodated by existing contractual arrangements.

Response 7— Reclamation accepts the rationale and suggested language for CE Qualification Factors #3 and #4. In addition, to ensure that potential transferees coordinate with other parties to such existing contractual arrangements, Reclamation revises CE Qualification Factor #6 as follows:

#6. The potential transferee must ensure that issues involving existing contracts and agreements, interstate compacts, and agreements are resolved, and treaty and international agreement obligations are fulfilled prior to transfer.

Finally, Reclamation revises the CE language itself to be consistent with the above revisions, and other clarifications with regard to the Secretary's responsibilities, as follows: "Transfer from Federal ownership of facilities and/or interest in lands to a qualifying entity where there are no competing demands for use of the facilities; where the facilities are not hydrologically integrated; where, at the time of transfer, there would be no planned change in land or water use, or in operation, or maintenance of the facilities; and where the transfer would be consistent with the Secretary's responsibilities, including but not limited to existing contracts or agreements, the protection of land resources and water rights held in trust for federally recognized Indian tribes and Indian individuals, and ensuring compliance with international treaties and interstate compacts."

Comment 8—Clarification on "severing ties:" Commenters referred to language

provided in Reclamation's Federal Register notice proposing the title transfer CE, introductory paragraphs, where we state, "The transfer of title of a project or set of facilities will, in effect, sever Reclamation's ties with that project or those conveyed facilities." The comments noted that "even if title is transferred, ties with Reclamation are not severed. For example, the relationship with a water district would remain."

*Response 8*—Because Reclamation would no longer own, operate, or otherwise manage transferred assets, transfers will normally sever its contractual relationships with affected water districts.

*Comment 9—Project power:* Multiple commenters discussed the need for continued access to project power for title transfer projects.

*Response 9*—The comment appears to be more related to the terms and conditions of title transfers rather than our review to establish a new CE. Reclamation would implement the terms and conditions of any Congressional action authorizing a title transfer, including any Congressional directive related to project use power.

*Comment 10—Public interest and public trust:* Multiple commenters questioned how operations of the transferred facilities would be carried out in such a manner that the public interest is maintained.

*Response 10*—Similar to the comment above, it appears to be more related to the terms and conditions of title transfers rather than our review to establish a CE. Reclamation would implement the terms and conditions of any Congressional action authorizing a title transfer. Once title is transferred, Reclamation has no authority over a non-Federal entity.

*Comment 11—Indian trust resources:* The commenter questioned how Indian trust

resources would be managed and whether they would be maintained in a manner similar to that of the Federal Government.

*Response 11*—The United States cannot transfer its Indian trust responsibilities. Therefore, eligibility to use this CE would only involve proposals for which there are no Indian trust responsibilities. Language in Eligibility criterion #5 is amended to clarify this point, as follows: *The transfer would not include lands or facilities involving Indian trust responsibilities.*

*Comment 12—Delegation to non-Federal entities:* Multiple commenters questioned if Reclamation will delegate Federal authority to ensure proper management and protection of public trust resources.

*Response 12*— In general, Reclamation may not delegate its authorities to a non-Federal entity under title transfer. Once title is transferred, Reclamation has no authority over the facility or the owner. Under CE Qualification Factors, title transferees are required to demonstrate ability to properly manage the subject lands and facilities, which would be reflected in title transfer conditions and agreements.

*Comment 13—Large and complex projects:* The commenter questioned whether Reclamation will apply this CE to large and complex projects, such as the Federal Columbia River Power System.

*Response 13*— Reclamation will carefully apply this CE to only those proposed projects meeting the CE Qualification Factors and free of extraordinary circumstances. Each proposed title transfer will be reviewed on a case-by-case basis.

*Comment 14—Additional considerations to determine eligibility to use a CE:* The commenter expressed concern about several topics (below) and questioned how project

requirements would be met:

- Illegal water deliveries, over-appropriation (e.g., the Umatilla Basin controversy)
- Maintaining instream flow
- Ensuring tribal trust
- Re-allocation of water
- Discretion in mitigation
- Addressing damages to subject facilities caused by unforeseen circumstances (forces of nature, time)
- Addressing damages downstream caused by subject facilities (dam failure, slope failure, flooding)
- Congressional approval (all transfers require Congressional approval)

*Response 14*— Reclamation's proposed new CE is intended to appropriately define and limit use to only those title transfer actions that meet CE Qualification Factors, do not involve extraordinary circumstances, and will not result in individually or cumulatively significant environmental impacts. Reclamation considered other factors for its proposed CE, including some indicated by the commenter. For example, for a proposal to qualify for use of the CE, the transferee would be required to ensure there are no competing demands for the use of transferred facilities and the transfer would not include lands or facilities involving Native American trust responsibilities. Reclamation has determined that the commenter's suggestions are substantially satisfied by current CE Qualification Factors and analysis against extraordinary circumstances. Reclamation will consider all relevant factors when determining both the eligibility of the CE and the potential for extraordinary circumstances on each proposed title transfer.

*Comment 15—Frequency of title transfer actions:* The commenter expressed concern that establishing a CE would result in more frequent implementation of these types of actions and cumulative impacts of wide-scale disposal of Federal lands.

*Response 15—*Reclamation anticipates that establishing a CE would not change the overall number of potential, eligible title transfer proposals. Of those, only title transfers meeting CE Qualification Factors would be eligible to use the CE. Reclamation does not anticipate that establishing this CE would result in a wide-scale disposal of Federal lands.

*Comment 16—CE development process:* The commenter requests that Reclamation reconsider drafting of its proposal to establish a CE and recommends issuing a revised notice.

*Response 16—*Reclamation appreciates the commenter's suggestions and has revised the CE definition and CE Qualification Factors in response to comments to correct and clarify language. These changes will help ensure use of the CE only for title transfers that would *not* result in significant impacts. Reclamation is establishing this title transfer CE consistent with CEQ and Department regulations and guidance.

*Comment 17—Change in use:* The commenter expressed concern that the “...language in the CE, ‘at the time of transfer,’ leaves open the possibility that these same facilities may undergo such changes in the future without the procedures and protections to the environment that normally would be required of Reclamation under NEPA.”

*Response 17—*The basis of this CE is that it applies only in instances where, at the time of transfer, such changes are not contemplated; and if they are, the use of this CE would not be allowed. This determination relies on the stated intentions of the potential

transferee and the assumption that parties enter the agreement in good faith. Reclamation understands there is a chance a potential transferee could falsely state its intention or change its plan over time. These circumstances would be no better served by preparing an EA or an EIS. Reclamation believes that the potential for this scenario is mitigated by the underlying purposes of the project, in which a potential transferee is already invested and the interest a potential transferee would have in protecting its business integrity with Reclamation and others.

*Comment 18—Undermines NEPA:* The commenter is concerned that “...the desire for a speedy environmental review has undermined the very existence of NEPA.”

*Response 18—* As provided in CEQ regulations and guidance, establishing a CE and appropriately using CEs are consistent with the policy and objectives of NEPA.

**Text of Addition to 516 DM 14, section 14.5 Categorical Exclusions:**

**F. Title Transfer Activities**

(1) *“Transfer from Federal ownership of facilities and/or interest in lands to a qualifying entity where there are no competing demands for use of the facilities; where the facilities are not hydrologically integrated; where, at the time of transfer, there would be no planned change in land or water use, or in operation, or maintenance of the facilities; and where the transfer would be consistent with the Secretary’s responsibilities, including but not limited to existing contracts or agreements, the protection of land resources and water rights held in trust for federally recognized Indian tribes and Indian individuals, and ensuring compliance with international treaties and interstate compacts.”*

**CE Qualification Factors.**

The CE is limited to the transfer of projects and/or project facilities from Federal ownership to a qualifying entity, which means an agency of State or local government or Indian tribe, a municipal corporation, quasi-municipal corporation, or other entity such as a water district that, as determined by the Secretary, has the capacity to continue to manage the conveyed property for the same purposes for which the property has been managed under Reclamation law. Accordingly, projects involving the following considerations (CE Qualification Factors) of a qualifying non-Federal entity would generally be eligible to be considered for the title transfer CE:

1. The potential transferee must demonstrate the technical capability to maintain and operate the facilities and lands on a permanent basis and an ability to meet financial obligations associated with the transferred assets.
2. The potential transferee must affirm that it has no plans to change the maintenance, operations, or use of the lands and water associated with the transferred facilities.
3. The potential transferee must ensure that there are no competing demands for use of the transferred facilities, with the exception of those demands accommodated by existing contractual arrangements.
4. The potential transferee must ensure that the facilities proposed for transfer are not hydrologically integrated with other facilities, thereby impacting other contractors, stakeholders or activities, with the exception of those impacts accommodated by existing contractual arrangements.
5. The transfer would not include lands or facilities involving Indian trust responsibilities.

6. The potential transferee must ensure that issues involving existing contracts and agreements, and interstate compacts and agreements, are resolved, and treaty and international agreement obligations are fulfilled prior to transfer.

7. The potential transferee must assume responsibility for all commitments and agreements into the future.

8. Potentially affected state, local, and tribal governments, appropriate Federal agencies, and the public will be notified of the initiation of discussion to transfer title and will have: (a) the opportunity to comment and suggest options for remedying any problems; and (b) full access to relevant information, including proposals, analyses, and reports related to the proposed transfer. The title transfer process will be carried out in an open and public manner. If a project or facility is not eligible for transfer under Public Law 116-9, Title VIII, the transfer proponent may seek legislation to authorize the negotiated terms of the transfer of each project or facility.

Eligibility for this CE would be determined by Reclamation, based on the results of on-site inspections, surveys, and other methods of evaluation and documentation prepared by Reclamation to determine the presence or absence of the exceptions. To determine that a proposed title transfer fits within the CE, Reclamation would review the proposal to determine that all the following apply:

1. The Department's extraordinary circumstances would not be triggered by the title transfer action.

2. The title transfer action would not change:

- a. operation and maintenance of the facilities or lands transferred;
- b. land or water use.

3. The title transfer action would not involve any unresolved issue associated with compliance with interstate compacts and agreements; meeting the Secretary's Indian trust responsibilities; and fulfilling treaty and international agreement obligations.

Even for a title transfer action that meets these criteria, Reclamation may, at its sole discretion, decide to prepare an EA or an EIS instead of applying the CE.

**Public Law 116-9, Title VIII, Subtitle A, Reclamation Title Transfer.**

Title VIII facilitates the transfer of title to certain Reclamation project facilities. Reclamation's proposal to establish a new CE for title transfer is separate and independent from implementation of Title VIII. Reclamation anticipates that the applicability of the new CE to proposed projects qualifying for title transfer under Title VIII would be analyzed on a case-by-case basis. Likewise, proposed projects that qualify for the new CE may not qualify for inclusion under Title VIII. We note, however, that both Title VIII and Reclamation's draft language from its Federal Register Notice on October 17, 2018 (83 FR 52503) for the CE referenced "eligibility criteria." Given that the two lists' specific eligibility criteria differ, Reclamation will use the term "CE Qualification Factors" for the CE to minimize confusion with the law. In addition, Reclamation has modified CE Qualification Factor #8 to account for title transfer proposals that may already be authorized under Title VIII, as well as those not yet authorized.

**Categorical Exclusion.**

The Department and Reclamation find that the category of actions described in the CE (below), limited by the CE Qualification Factors, does not individually or cumulatively have a significant effect on the human environment. This finding is based

on analysis of Reclamation's proposal to establish this CE, including analysis of Reclamation's title transfer actions. To date, Reclamation has prepared EAs and made findings of no significant impact (FONSI) on eight projects that were limited in scope, consistent with the CE Qualification Factors. The EA and FONSI documentation for these projects is available at [www.usbr.gov](http://www.usbr.gov). Reclamation has prepared two EISs on title transfer proposals and two EAs for projects that involved more complex actions than those that would meet the CE Qualification Factors. In addition, Reclamation has prepared 12 EAs and FONSI on title transfer proposals for which mitigation was applied to reduce impacts to less than significant. Several of these proposals involved issues of concern including sites of interest to tribal communities and adverse effects to historic properties. The full complement of these EAs, FONSI, EISs, and Reclamation's knowledge and experience contribute to the body of work Reclamation has used to analyze its title transfer actions and validate its definition of projects for which the CE would be used.

The CEQ has reviewed the comments received and Reclamation's responses to those comments and has approved the CE. Therefore, the Department will add the final CE to the Departmental Manual at 516 DM 14.5 paragraph F., which covers "Title Transfer Activities." Reclamation recognizes that certain proposed title transfer actions, when reviewed on a case-by-case basis, could trigger one or more of the extraordinary circumstances for which it is not appropriate to utilize the CE. In such cases, the proposed title transfer actions could have a significant environmental effect and would require additional NEPA analysis. Thus, prior to applying the CE, Reclamation will review all extraordinary circumstances in the Department's NEPA regulations. If any

extraordinary circumstance does apply, Reclamation will conduct additional NEPA analysis and prepare an EA or EIS.

**Amended Text for the Departmental Manual.**

The text that will be added to 516 DM is set forth below:

**Part 516:** National Environmental Policy Act of 1969

**Chapter 14:** Managing the NEPA Process—Bureau of Reclamation

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**14.5 Categorical Exclusions.**

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F. Title Transfer Activities.

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(1) Transfer from Federal ownership of facilities and/or interest in lands to a qualifying entity where there are no competing demands for use of the facilities; where the facilities are not hydrologically integrated; where, at the time of transfer, there would be no planned change in land or water use, or in operation, or maintenance of the facilities; and where the transfer would be consistent with the Secretary's responsibilities, including but not limited to existing contracts or agreements, the protection of land resources and water rights held in trust for federally recognized Indian tribes and Indian individuals, and ensuring compliance with international treaties and interstate compacts.

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